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CASES CITED.

STATUTES AND MISCELLANEOUS REFERENCES.

In the Supreme Court of the United States.

OCTOBER TERM, 1914.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
HERMAN A. SALEN.
No. 506.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This is a writ of error to the District Court of the United States for the Southern District of New York, brought under the criminal appeals act of March 2, 1907 (34 Stat., 1246), to review a decision on demurrer based upon what is claimed by the United States to be an erroneous construction of subsections 5 and 6 of section 28 of the act of August 5, 1909 (c. 6, 36 Stat. 1192).

The defendant was indicted under subsection 6 of said act on six counts, on five of which the demurrer filed by the defendant was overruled and on the

sixth count of which the demurrer was sustained. Subsection 6 provides as follows:

> That any person who shall knowingly make any false statement in the declarations provided for in the preceding section, or shall aid or procure the making of any such false statement as to any matter material thereto, shall, on conviction thereof, be punished by a fine not exceeding five thousand dollars, or by imprisonment at hard labor not more than two years, or both, in the discretion of the court: *Provided*, That nothing in this section shall be construed to relieve imported merchandise from forfeiture by reason of such false statement or for any cause elsewhere provided by law.

The "preceding section," subsection 5, provides, in part, as follows:

> That whenever merchandise imported into the United States is entered by invoice, one of the following declarations, according to the nature of the case, shall be filed with the collector of the port, at the time of entry by the owner, importer, consignee, or agent; which declaration so filed shall be duly signed by the owner, importer consignee, or agent, before the collector, or before a notary public or other officer duly authorized by law to administer oaths and take acknowledgments, who may be designated by the Secretary of the Treasury to receive such declarations and to certify to the identity of the persons making them, under regulations to be prescribed by the Secretary of the Treasury; and every

officer so designated shall file with the collector of the port a copy of his official signature and seal: *Provided*, That if any of the invoices or bills of lading of any merchandise imported in any one vessel, which should otherwise be embraced in said entry, have not been received at the date of the entry, the declaration may state the fact, and thereupon such merchandise of which the invoices or bills of lading are not produced shall not be included in such entry, but may be entered subsequently.

DECLARATION OF CONSIGNEE, IMPORTER, OR AGENT, WHERE MERCHANDISE HAS BEEN ACTUALLY PURCHASED.

I, ——— ———, do solemnly and truly declare that I am the consignee, importer, or agent of the merchandise described in the annexed entry and invoice; that the invoice and bill of lading now presented by me to the collector of ——— are the true and only invoice and bill of lading by me received of all the goods, wares, and merchandise imported in the ———, whereof ——— is master, from ———, for account of any person whomsoever for whom I am authorized to enter the same; that the said invoice and bill of lading are in the state in which they were actually received by me, and that I do not know or believe in the existence of any other invoice or bill of lading of the said goods, wares, and merchandise; that the entry now delivered to the collector contains a just and true account of the said goods, wares, and merchandise,

according to the said invoice and bill of lading; *that nothing has been on my part, nor to my knowledge on the part of any other person, concealed or suppressed, whereby the United States may be defrauded of any part of the duty lawfully due on the said goods, wares, and merchandise;* that the said invoice and the declaration therein are in all respects true, and were made by the person by whom the same purport to have been made; and that if at any time hereafter I discover any error in the said invoice, or in the account now rendered of the said goods, wares, and merchandise, or receive any other invoice of the same, I will immediately make the same known to the collector of this district. And I do further solemnly and truly declare that to the best of my knowledge and belief (insert the name and residence of the owner or owners) is (or are) the owner (or owners) of the goods, wares, and merchandise mentioned in the annexed entry; that the invoice now produced by me exhibits the actual cost at the time of exportation to the United States in the principal markets of the country from whence imported of the said goods, wares, and merchandise, and includes and specifies the value of all cartons, cases, crates, boxes, sacks, casks, barrels, hogsheads, bottles, jars, demijohns, carboys, and other containers or coverings, whether holding liquids or solids, which are not otherwise specially subject to duty under any paragraph of the tariff act, and all other costs, charges, and expenses incident to placing said goods, wares, and merchandise in condition, packed

ready for shipment to the United States, and no other or discount, bounty, or drawback but such as has been actually allowed on the same.

* * * * *

The sixth count of the indictment in substance charged that, as required by statute, the defendant, on March 17, 1913, signed and swore to a declaration stating that he was the consignee, importer, or agent of the merchandise described in the annexed entry, which declaration was attached to an entry of certain cotton laces, imported into New York March 17, 1913, from France, and was presented to the collector of customs; that in the declaration he made oath that nothing had been on his part, or to his knowledge on the part of any other person, concealed or suppressed whereby the United States might be defrauded of any part of the duty lawfully due on the laces, and that this statement was false to his knowledge. The indictment then proceeded to set forth the following facts of an evidential nature to support the allegation that Salen knew the falsity of his statement and to show wherein it was false, viz, that Salen knew that, for a period of eight years theretofore, the owner Goetz had been shipping from France to New York similar laces for delivery after importation to one Robinson as ultimate consignee; that all such shipments had been accompanied by invoices like the present invoice; that Salen knew that in these previous invoices false and fraudulent values had been placed on the laces uniformly greatly below the prices at which the laces,

to Salen's knowledge, had been or were to have been sold in the United States; that Salen had acquired this knowledge from the large and uniform differences between the alleged foreign market values stated in the invoices and the prices at which the merchandise was sold in the United States; that Salen knew that the shipment in question was one of this series of shipments; and knew that as to this shipment and all the series of previous shipments there was concealed and suppressed on his part and on the part of Goetz and of Robinson a great and uniform discrepancy between the values stated in the invoice and the prices at which the merchandise was sold in the United States; that Salen knew that during the past eight years, after each entry of the various shipments, he had received from Robinson a statement containing the prices at which the laces of each shipment had been sold, which prices Salen knew were vastly in excess of the values stated in the invoice even after making due allowance for duties, freight, insurance, commissions, charges, and a reasonable profit; and Salen knew that on the shipment in question he would receive a like statement of the prices at which the laces shipped had been or would be sold, showing a like great excess over the alleged foreign-market value after making the above allowances.

The indictment proceeded to allege that the collector of customs would acquire knowledge that the value stated in the invoice was false and fraudulent if the said statement were delivered to him; that

Salen knew that if the collector had been informed of the facts so suppressed and concealed, he would not have accepted the invoice value as true, and would have instituted inquiry and applied for reappraisement, which, if made and applied for, would have disclosed the false and fraudulent undervaluation on the invoice; that Salen concealed and suppressed these facts with intent to prevent such inquiry and reappraisement, and that thereby the United States might have been defrauded of a part of the duty lawfully due on the laces. [Record, pp. 16–20.]

In brief, the indictment alleged a knowledge on the part of the defendant, Salen, of a series of previous shipments covering eight years in which values had been falsely and fraudulently underrated, and further knowledge that the present shipment was one of that series in which the values were underrated, and further alleged a failure to disclose this knowledge and a concealment and suppression of the same from the collector, a disclosure of which would have led the collector to make inquiry and order a reappraisal; and that by such failure to disclose such fact the United States might have been defrauded of duties.

The defendant demurred on various grounds, but primarily [Record, p. 21]:

> First. That it fails to allege or aver any facts sufficient to constitute an offense under the provisions of subsection 6 of section 28 of the act of Congress of August 5, 1909, or any other statute of the United States.

The court sustained the demurrer on the following ground [Record, p. 28]:

> The sixth count is only useful if the following be true, viz., that there never was another invoice to the consignment specified, but that Salen knew of so long a course of fraud on the customs carried on by Goetz & Robinson that from such customary fraud he was bound to assume the entry specified to be also a fraud, and tell the collector of his belief.
>
> This may be more shortly stated thus—failing to use knowledge of 25 successive fraudulent entries makes the 26th failure a crime.
>
> If all the facts stated in the sixth count were shown I can not think it my duty to send them to a jury, and therefore the demurrer is sustained.

For the sake of clearness it may be well to insert here the ruling of the court overruling the demurrer as to the first five counts [Record, p. 27]:

> The first five counts assert that Salen falsely swore there was no other invoice, when he knew there was. This is plain enough, for he knows better what he knew than anyone else can. Usually this would dispose of the matter, for any further statement by the prosecution would be merely a statement of evidence—to which the best objection is, that the defendant ought not to be informed of the evidence against him, because of the danger of fabrication of evidence contra.
>
> Where (as here) the vital evidence is a piece of paper, no danger to justice exists in show-

ing it, and if defendant thinks that if exhibited it would appear not be an invoice—in such wise that the court would have to so hold as matter of law—that point ought to be presented in advance of trial. To do so saves time and expense.

Therefore a motion for B/P will be entertained, but the demurrer is overruled as to counts 1 to 5 inclusive.

SPECIFICATIONS OF ERROR.

The specifications of error were as follows [Record, p. 29]:

1. The court erred in sustaining the demurrer to the sixth count of the indictment herein.

2. The court erred in not overruling the demurrer to the sixth count of the indictment herein.

3. The court erred in holding as a matter of law that the allegations of the sixth count of the indictment herein were insufficient in law.

ARGUMENT.

I.

The case is properly before this court under the criminal appeals act.

Under the criminal appeals act, this Court can review a decision of the lower court in case the decision involved a construction of the statute.

To construe the statute is to consider whether the acts as charged in the indictment are denounced or condemned as criminal by the statute.

> The court could not have decided as it did that the acts charged are not within the condemnation of the statute, without first ascertaining what it does condemn, which, of course, involved its construction. (*United States* v. *Pullen* (1913), 226 U. S. 525, p. 535.)

See also,

United States v. *Bitty* (1908), 208 U. S. 393;
United States v. *Keitel* (1909), 211 U. S. 370, p. 385;
United States v. *Biggs* (1909), 211 U. S. 507, p. 518;
United States v. *Mason* (1909), 213 U. S. 115, p. 122;
United States v. *Corbett* (1909), 215 U. S. 233, p. 237;
United States v. *Mescall* (1909), 215 U. S. 26, p. 31;
United States v. *Stevenson* (1909), 215 U. S. 190, p. 195;
United States v. *Heinze* (1910), 218 U. S. 532.
United States v. *Kissel* (1910), 218 U. S. 601, p. 606;
United States v. *Miller* (1912), 223 U. S. 579, p. 602;
United States v. *Carter* (1913), 231 U. S. 492; and
United States v. *Birdsall* (1914), 233 U. S. 223.

We may parallel the language used by this Court in *United States* v. *Heinze*, No. 2 (1910), 218 U. S. 547, p. 550,

> The court * * * said "the allegations set forth specially did not even prima facie

> amount to a conversion." The question naturally occurs, why the court thought so? And the answer must be from the conception it had of the requirements of the statute,

and say here—

> The court * * * said "failure to use knowledge of 25 successive fraudulent entries by telling the collector of his belief is not a violation of an oath to the effect that nothing has been concealed," etc. The question naturally occurs why the court thought so. And the answer must be from the conception it had of the requirements of the statute.

The questions in this case are: Was a statement of fact made by the defendant in his declaration? Was it false and knowingly made?

The declaration was that "nothing has been on my part concealed or suppressed whereby the United States may be defrauded," etc.

The allegation in the indictment is that the defendant suppressed a knowledge of a series of prior frauds, and a knowledge that this was one of the series, and that by this suppression the United States might have been defrauded of duties.

The court below has held that knowledge of a chain of past fraudulent invoices of which the present is known to be a link is not knowledge of anything required by the statute to be disclosed.

The judge states in his opinion, very cogently, the contention which the United States makes:

> That Salen knew of so long a course of fraud on the customs carried on by Goetz and Robin-

son that from such customary fraud he was bound to assume the entry specified to be also a fraud, and tell the collector of his belief.

Failing to use knowledge of 25 successive fraudulent entries makes the 26th a crime.

The judge concludes, however, that as matter of law the above contention finds no support in the statute. This conclusion, however, is not a construction of the indictment, for the United States and the judge did not differ as to the meaning of the indictment.

The court below evidently either construed the word "nothing" in the statute as meaning "nothing stated in the invoice or entry itself," or else it held that the fact which the indictment charges the defendant with having concealed is literally "nothing," within the words of the statute. In other words, the court gave a definition to "nothing" as used in the statute.

II.

The penalties imposed by customs law are intended for the prevention of fraud, the protection of the revenue, and the protection of honest importers. The act should be so construed as to give effect to this intention in general and to the evident intent of Congress in particular to require of the importer, by means of the provisions of subsection 5, the observance of the highest degree of good faith toward the Government.

A brief survey of the many provisions against fraud and the many penalties imposed in the general scheme of tariff legislation show the insistent demand of Congress for good faith on the part of the importer.

First. A duly certified invoice, or in absence of an invoice, a statement under oath.

> And it shall be lawful for the collector * * * to examine the defendant under oath * * * and to require him to produce any letter, paper, or statement of account in his possession or under his control which may assist the officers of the customs in ascertaining the actual value of the importation. (Act of August 5, 1909, c. 6, section 28, subsection 4, 36 Stat., p. 92.)

Second. A declaration under oath filed with the invoice, such as the one in question. (Ibid., subsection 5.)

Third. Punishment for making a false statement in the declaration—$5,000 fine, or imprisonment at hard labor for not over two years, or both. (Ibid., subsection 6.)

Fourth. An appraisal by the appraiser and if appraised value exceeds entry value by more than 75 per cent, the entry to be held presumptively fraudulent, and goods to be seized and proceeded against for forfeiture. (Ibid., subsection 7.)

Fifth. In case of entry or attempt to enter by means of a fraudulent or false invoice, paper, or practice, and of any willful act or omission likely to deprive the United States of duties—forfeiture of goods and also punishment by fine and imprisonment. (Ibid., subsection 9.)

Sixth. Power in collector to order a reappraisement and power to appeal to re-reappraisement. (Ibid., subsection 13.)

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Seventh. Power in collector and appraisers to examine an importer, etc., under oath, "touching any matter or thing which they or either of them may deem material respecting any imported merchandise in ascertaining the dutiable value or classification thereof." (Ibid., subsection 15.)

Eighth. Punishment by fine of $100 on any person failing to appear or answer. Punishment for perjury for false testimony. Forfeiture of goods in case of false testimony. (Ibid., subsection 16.)

Ninth. Power in collector to reliquidate the duties at any time in case of fraud and within one year in absence of fraud. (Ibid., subsection 16.)

> Act of June 22, 1874, section 21 (18 Stat. 190);
>
> *United States* v. *Campbell* (1882), 10 Fed. 816;
>
> *United States* v. *Leng* (1883), 18 Fed. 15; and
>
> *United States* v. *De Rivera* (1896), 73 Fed. 679.

The provisions of the tariff laws prescribing declarations and oaths by importers, and providing for forfeiture of goods and affixing penalties for false oaths and other fraudulent practices, are intended for the prevention of fraud, the protection of the revenue, and the protection of honest importers as well.

See *Bollinger's Champagne* (1865), 3 Wall. 560, page 564:

> No doubt one of the objects of the provision is to secure to the Government the duties imposed by the statute, but another is to protect

> the officers against imposition and fraud by the importer or agent, and to inculcate and enforce good faith and honest dealing with those officers while engaged in the execution of their duties.

See also *Cliquot's Champagne* (1865), 3 Wall. 114, p. 145; *United States* v. *26 Bales* (1859), 3 Ware 205, p. 210.

In construing the act in question, therefore, it is the duty of this Court to give effect to the manifest intention of the customs law, to require of the importer the observance of a high degree of good faith toward the Government.

III.

The words "nothing has been concealed or suppressed," as used in subsection 5, do not mean nothing has been concealed or suppressed *in the entry and invoice*. The history of the statute shows that Congress had intended to make the scope of the declaration a wide one, and to impose an obligation not to suppress or conceal *anything* (whether in the entry and invoice or not), which might tend to defraud the United States of duties.

In considering the meaning of the declaration prescribed to be sworn to by subsection 5 of the act, it is necessary to review its pedigree.

The form of the oath to be taken by an importer, consignee, or agent was first prescribed in the act of March 2, 1799, c. 22, section 36 (1 Stat. 627, p. 657), and was phrased in substantially the same terms as the oath at present required—with the following important exception. The clause corresponding to the

clause on which the present indictment is based read as follows.

> *I also swear (or affirm) that nothing has been concealed or suppressed in the entry aforesaid, whereby to avoid the just payment of the duties imposed by the laws of the United States, and that all matters are justly and truly expressed therein, according to my best knowledge and belief.*

In the act of March 1, 1823, c. 21, section 5 (3 Stat. 729, p. 730), the language of the oath was changed so as to read in this clause as follows:

> I, ——— ———, do solemnly and truly (swear or affirm) * * * ; *that nothing has been, on my part, nor to my knowledge on the part of any other person, concealed or suppressed, whereby the United States may be defrauded of any part of the duty lawfully due on the said goods, wares, and merchandise.*

The form of oath prescribed in the act of 1823 reappears in Revised Statutes, section 2841; in the act of March 3, 1883, c. 121, section 8 (22 Stat. 488); act of June 10, 1890, c. 145, section 5 (26 Stat. 407); and act of August 5, 1909, c. 6, section 28, subsection 5 (36 Stat. 11).

The change in the language brought about by the act of 1823 is extremely significant in two ways:

(*a*) The words "In the entry aforesaid," which, in the earlier act, had been inserted after the words "Nothing has been concealed or suppressed," were dropped out.

(*b*) The words "On my part, nor, to my knowledge, on the part of any other person," were inserted before the words "Concealed or suppressed."

The evident intent of the act of 1823 was to impose upon the importer the obligation of the greatest possible good faith toward the Government, by requiring of him an oath that, at the time he made an entry, there was nothing within the realm of his knowledge which he or any other person had done and was concealed or suppressed by him, information regarding which, if so concealed from the Government, might result in a loss of duties on the goods then being imported.

That this was the effect of the changes brought about by the act of 1823 is made evident in an opinion of Judge Hand, in this same case, in ruling upon a motion relative to the first five counts in the indictment, which had previously been upheld by Judge Hough. In his memorandum of decisions, dated June 30, 1914 (copy of which is printed in the appendix to this brief, marked "A"), Judge Hand states:

> Under forms 1 and 2 the declarant must swear that neither he nor anyone else has suppressed anything. Obviously this includes also matters which could not be included in the invoice and refers to information which would not naturally be in the invoice. To interpose the words "in such entry or invoice" into forms 1 and 2 makes nonsense if only the declarant is to swear to

it. Nor can I agree that the suppression must be of a document which would in usual course come to the authorities, as such invoices as these would not. If the declaration includes, as it does, matters extraneous to the invoice itself, it can not be limited to other documents which usually come to the authorities, because usually no other documents do come, and the entry is made upon the consular invoice. The general purpose, indeed, of the declaration clearly is to search the conscience of the declarant and to require him to state all that he knows which anyone is keeping from the authorities and which would result in higher duties. It would be narrow to seek to give it less than its natural scope. If a distinction is sought between failure to disclose and suppression or concealment, it is enough for this purpose to refer to the fact that the United States here asserts that the figures corresponded between consular invoices and these documents, but that the correspondence was colorable and intended to deceive.

The oath and declaration prescribed by the statute comprises distinct statements as follows:

(*a*) That the invoice and bill of lading is the true and only invoice received.

(*b*) That it is in the state actually received.

(*c*) That the importer neither knows nor believes in the existence of any other invoice.

(*d*) That the entry contains a just and true account of the goods according to the invoice.

(*e*) That if the importer discovers any error, he will make the same known to the collector.

(*f*) That a certain named party is the owner of the goods.

(*g*) That the invoice represents the actual market value, etc.

If the additional statement required in the clause providing "nothing has been concealed or suppressed," etc., refers only to a concealment or suppression *in the entry itself*, then this clause added nothing whatever to the statement already required in clause (*d*), *supra*.

In the construction of statutes the rule is clearly established that no part of an act shall be regarded as superfluous if a construction can be found legitimately which will make it effectual.

IV.

If Salen knew certain facts which would have influenced any ordinary reasonable man acting as collector, in investigating or ordering an investigation or appraisement or reappraisement of values, and if Salen concealed such knowledge on his part, then he certainly concealed "something" and swore falsely when he made oath that "nothing was concealed or suppressed by him."

United States v. *Cargo of Sugar* (1874) 3 Sawyer, pages 50, 51 (Hoffman, J., in charge to the jury):

> Treating, therefore, Mr. De Ro's oath as if it were made by the owner, it is claimed by the prosecution that it is false. He swears, gentlemen, that he has not concealed or sup-

pressed any fact whereby the revenue of the United States might be defrauded.

It is argued, with the ingenuity which has characterized counsel throughout the whole case, that the suppression or concealment of any fact which the law does not call upon him to disclose is not wrongful, and that inasmuch as, in this case, it was not requisite that in the entry, or the invoice, the color of the goods should be stated, the suppression or concealment of the true color could not be an offense. It is true, gentlemen, that the color of the sugars is not required to be stated in the invoice, but from the nature of the oath that is required to be taken it appears to me plain that Congress intended by imposing so searching an oath that there should be disclosed at the time, and not suppressed or concealed, any fact, whether required to be stated in the entry or invoice or not, which it was important to the interests of the revenue to be known, or whereby the revenue of the United States might be defrauded.

V.

The importer's duty of disclosure to the Government is an obligation uberrimae fidei, as broad as that imposed upon the insured in marine insurance.

The Government claims that the obligation *uberrimae fidei* imposed on an importer by the revenue act demanding a statement that he has concealed nothing, is an obligation exactly as broad as that imposed upon the insured in a case of marine insurance, and that the language of this Court in *Sun*

Mutual Insurance Co. v. *Ocean Insurance Co.* (1882), 107 U. S. 485, p. 509, measures the extent of the importer's duty with reference to his oath and declaration, quite as well as the insured's duty with reference to the taking out of his marine policy.

> That knowledge of the circumstances was material and important to the underwriters as likely to influence his judgment in accepting the risk, we think, is so manifest to common reason as to need no proof of usage or opinion among those engaged in the business. * * * Had it been known, it is reasonable to believe that a prudent underwriter would not have accepted the proposal as made * * *. The concealment, whether intentional or inadvertent, we have no hesitation in saying, avoids the policy, if actually intended to cover the risk for which the claim is made. * * * The obligation in both cases is one *uberrimae fidei*. The duty of communication, indeed, is independent of intention, and is violated by the fact of concealment, even where there is no design to deceive.

(See also Story, J., in *Columbia Ins. Co.* v. *Lawrence* (1836), 10 Peters, 507, p. 516.)

VI.

Whether Salen's suppression of his knowledge of prior fraudulent shipments constitutes a suppression of "nothing" may be tested by considering whether he could have been examined under oath regarding such knowledge, on a summons under subsection 15 of the act which gives the appraiser and collector a power to examine "touching any matter or thing which they may deem material."

Subsection 15 of this same customs administrative act of 1909 provided that the appraisers or the collector might cite to appear, any owner, importer, agent, or consignee, and examine them upon oath "touching any matter or thing which they or either of them may deem material, respecting any imported merchandise, in ascertaining the dutiable value or classification thereof."

The only limit to the collector's power to examine is that his questions must "be relevant to the subject matter."

United States v. *Doherty* (1886), 27 Fed. 730, pp. 733–735.

Information whether an importer had been engaged in a long line of prior revenue frauds was clearly such as would aid the appraisers in ascertaining the value of the shipment in question, as it would put them upon close scrutiny of the invoice and other facts surrounding it.

Thus, where A declared ownership in goods which actually belonged to B, B having been previously arrested for or suspected of smuggling, such act of A was held to justify forfeiture under section 9.

The court instructed the jury that the omission to state the real ownership might have resulted in defrauding the Government.

> You can see that if a man has been arrested or suspected of having been guilty of smuggling in one instance it would be for his advantage to have a friend to bring in the goods, in which he was interested, thereafter. (*United States* v. *One Bag of Crushed Wheat* (1908), 166 Fed. 562.)

VII.

Whether Salen's suppression of his knowledge of prior fraudulent shipments constitutes a suppression of "nothing" may also be tested by considering whether evidence that Salen knew of prior frauds in undervaluation would be admissible if he should be indicted for perjury in swearing to the present declaration that the invoice produced by him exhibits the actual market value, etc.

It has already been decided by this Court that, in an indictment for perjury for falsely taking the owner's oath, under the act of March 1, 1823, section 5 (the oath which is the prototype of the oath and declaration under subsection 5 of the act of 1909), in order to prove defendant's knowledge of the falsity of invoice prices sworn to by him, evidence might be admitted both of a combination to defraud previously entered into by him and of prior false invoices extending over three years.

United States v. *Wood* (1840), 14 Pet. 430.

(See statement of evidence introduced by the Government at p. 432.)

Further, on proceedings for forfeiture of goods, under the act of 1799, section 66, because of false owner's oath as to value, evidence has been held admissible to prove prior and other importations of a kindred character.

In *Taylor* v. *United States* (1845), 3 How. 197 Story, J., at pages 207 and 208, said:

> Another objection was to the admissibility of a bill of lading, entry, and owner's oath, taken on the 16th of July, 1839, in the month preceding the seizure of the goods in question, of nineteen cases of goods (not part of the goods seized) marked [B] F, i a 19. Although this evidence was objected to, and it was admitted, yet it does not appear upon the record that any exception was taken to the ruling. But, without dwelling upon this, which was perhaps an accidental omission, it is proper to say that this evidence was not offered as a single isolated document (for in that view it might be deemed at most as irrelevant and inconsequential for any purpose), but it was offered in connection with other documents and evidence to establish a privity between Taylor and Blackburne & Co. in other importations of a kindred character, and under a scheme of mediated fraud upon the revenue of the United States, of which these documents were a link in the chain. For this purpose they might be important and necessary; and although the whole evidence is not set forth in the record, yet it is apparent, from what is there found in refer-

ence to the next objection, that the evidence had an intimate connection and bearing upon that which is there stated.

The evidence thus held admissible was stated in the statement of facts as follows (see pp. 200–201):

> [The counsel of the United States, further to prove the issue on their parts, offered evidence to prove that William Blackburne & Co. had, in January, 1839, imported certain invoices (no part of the goods seized) into Philadelphia, and had entered them at the customhouse there; that the goods so imported had been appraised above the invoice prices; that the importers had acquiesced in such appraisement; and that Francis Blackburne thereupon stated that he had passed 140 cases at New York at similar prices, and would cease importing goods here; the the counsel stating that this was to be followed by evidence to show that he never did import into New York in his own name; all which evidence was objected to by the defendants, but was admitted by the court, to which the defendants then and there excepted; and the said evidence was thereupon given. And the plaintiffs further proved the admission of the defendant, Taylor, that the said mark B F was the mark of said defendant Francis Blackburne, and that said Taylor, as the agent of said Blackburne, had paid freight at New York for packages of goods imported there with that mark, and further proved that no importations had been made at that port in the name of said Francis Blackburne or of

said William Blackburne & Co. previously to the summer of 1839, but that large importations had been made there in the name of the claimant, John Taylor, jr. It was proved that the goods seized had been imported into New York and entered and passed there, and the duties thereupon paid. * * *]

VIII.

It is not necessary to allege in the indictment or to prove that the United States was actually defrauded of duties. It is only necessary to allege facts calculated to deprive, or of a character which might deprive, the United States of such duties.

In connection with the above statute requiring an oath upon entry of goods, and punishing violation of such oath, there is another section of the act of 1909 which also makes penal the entry or attempt to enter goods by means of any false invoice or other paper or by means of any false or fraudulent practice, or by means of any willful act or omission, through which the United States might be deprived of lawful duties. This is subsection 9 of section 28 of the act of 1909.

With reference to the latter it has been held by the courts that if the act or attempt is to enter merchandise by a false statement, etc., *of a character which is calculated or which naturally tends to deprive* the United States of duty, the statute is satisfied.

United States v. *66 Cases of Cheese* (1908), 163 Fed. 367.

United States v. *20 Boxes of Cheese*, (1908) 163 Fed. 369.

United States v. *19 Bales of Tobacco* (1898), 112 Fed. 779, p. 782.

See also under a statute providing for forfeiture in case of false or fraudulent statements, practices, or appliances (act of Mar. 3, 1863, c. 76, sec. 1, 12 Stat. 737; Revised Statutes, sec. 2864).

Bollinger's Champagne (1865), 3 Wall. 560.

[Expressions to the contrary in *United States* v. *99 Diamonds* (1905), 139 Fed. 961, p. 965 (C. C. A., 8th Cir.), can hardly be sustained as law.]

IX.

Proof of an intent to defraud is not required by subsections 5 and 6 to be alleged or proved. All that is necessary is (a) a false statement, (b) knowingly made—i. e., made with knowledge of its falsity.

If Salen, knowing its falsity, made a statement in the present case that he had concealed nothing whereby the United States may be defrauded of any part of the duty lawfully due, he is guilty irrespective of any further intent to defraud.

United States v. *Fawcett* (1897), 86 Fed. 900:

X.

The statement in the declaration was "material thereto," i. e., material to the declaration.

It was a statement as to a concealment or suppression whereby the United States might be defrauded of duty on the imported goods. It was a material part of the declaration required to be sworn to.

It has been held in this same case by Judge Hand in an opinion dated July 9, 1914, rendered on a motion to quash (see Appendix B), that—

> Coming then to the real question, that is, the materiality of the content of the statement, there can be no doubt that the absence of any suppressed facts by which the United States might be defrauded, was material to the action of the authorities. It gave them added assurance of the truth of the invoice and enabled them to assume that it was a complete statement of the truth. * * *
>
> The "matter material" means, I think, the subject matter or contents of the statement, not the facts to which the statement refers. It is no more than a provision that the statement shall itself be material.

CONCLUSION.

It is respectfully submitted that the demurrer should have been overruled and the judgment in the court below should be reversed.

CHARLES WARREN,
Assistant Attorney General.

OCTOBER, 1914.

APPENDIX A.

United States District Court, Southern District of New York.

UNITED STATES OF AMERICA
against
HERMAN A. SALEN.

HAND, D. J.: I shall consider only the second question raised, i. e., whether it now appears that the indictment is defective in alleging that the defendant swore falsely in saying, "nothing has been on my part, nor, to my knowledge, on the part of any other person, concealed or suppressed whereby the United States may be defrauded." The clause must refer, I think, to information which, if known, would enable the United States to get larger duties than it would if the entry went through at the values fixed in the consular invoice. Knowledge of a suppressed invoice which in fact stated other values at the place of export, all would agree, would come within the clause. I can see no reason to limit the words to such an invoice; on the contrary, the fair meaning appears to me to include any document which, if known, would have led the United States to fix the duties at a higher figure. Of course, the United States must prove that the defendant knew that the document, if discovered, would have so resulted, and it may be hard to show that a document designed only as the basis of sale values would, if known, have resulted in such action by the United States. That, however, is not raised by this motion.

The sole question here is whether the United States by no possibility could show that documents, like those here in question, would inevitably have set the authorities upon an inquiry which would have resulted in larger duties. If, as is suggested, it had appeared that there were to the defendant's knowledge continuous and parallel invoices setting out selling prices five times as great as the consular invoices, I should at once have regarded the consular invoices as fraudulent, had I been an appraiser. Were I a juror I should have no difficulty, I think, in concluding that any man who knew of such invoices knew very well that they would provoke such action by the appraiser, and that their suppression therefore would defraud the United States of duty otherwise collectible. At least, I should ask for a very full explanation.

However, it is asserted that forms 3 and 4 show that the suppression must be in the entry or invoice. I am not prepared to assent to the proposition that, even if this was so, and the case arose under either form 3 or 4, it would not be a crime to swear to the declaration with such knowledge as is here alleged, but it is not necessary to go so far, because the phrase in forms 1 and 2 is purposely different. Under forms 1 and 2 the declarant must swear that neither he nor anyone else has suppressed anything. Obviously this includes also matters which could not be included in the invoice, and refers to information which would not naturally be in the invoice. To interpose the words, "in such entry or invoice" into forms 1 and 2 makes nonsense, if only the declarant is to swear to it. Nor can I agree that the suppression must be of a document which would in usual course come to the authorities, as such invoices as these would not. If

the declaration includes, as it does, matters extraneous to the invoice itself, it can not be limited to other documents which usually come to the authorities, because usually no other documents do come, and the entry is made upon the consular invoice. The general purpose indeed of the declaration clearly is to search the conscience of the declarant and to require him to state all that he knows which anyone is keeping from the authorities and which would result in higher duties. It would be narrow to seek to give it less than its natural scope. If a distinction is sought between failure to disclose and suppression or concealment, it is enough for this purpose to refer to the fact that the United States here asserts that the figures corresponded between consular invoices and these documents, but that the correspondence was colorable and intended to deceive.

I am satisfied that the counts are sufficient on this point and the motion is denied.

JUNE 30, 1914.

APPENDIX B.

United States District Court.
Southern District of New York.
UNITED STATES OF AMERICA
against
HERMAN A. SALEN.

HAND, D. J.: The objection to the indictment is that there is no allegation that the Goetz invoice was material to the "purposes of the declaration." This indictment falls within subsection six, which makes criminal any false statement in the declaration "as to any matter material thereto." In common-law prosecutions for perjury the indictment must allege

that the perjurious statement is material to the inquiry, which may be done, either by an allegation simply (*Markham* v. *U. S.*, 160 U. S. 325), or by pleading the setting from which the court may determine the materiality (*Reg.* v. *Harvey*, 8 Cox's Cr. Cases, 99; *Ammerman* v. *U. S.*, 185 Fed. R. 1).

I understand the argument to be that not only must the contents of the statement be material to the entry, but that the truth must be so likewise. It is, of course, scarcely possible that the contents of the statement should be relevant and the truth be irrelevant, but the case might be proved without showing any facts relevant to the entry, except in so far as the declarant's knowledge itself were relevant. For example, it might abundantly appear from the defendant's speech and conduct that his statement was false, without its appearing what were the true facts to which his false statement referred, and this would be quite enough to convict him. In this district at least we never require the United States in prosecutions for perjury to commit itself to the truth about the subject of the statement, but allow it to allege merely that the statement was consciously false, and prove that fact in any way it can. (*U. S.* v. *Freed*, 179 Fed. R. 236.) Many things might disprove the statement which would not prove the truth about its content at all. Under this rule the United States need have said nothing at all about the Goetz invoice or more than that the statement was consciously false. Other proof than the invoice no doubt will be produced upon the trial to show that Salen knew that its suppression might defraud the United States, but that need not be pleaded any more than the invoice need have been.

Coming then to the real question, that is, the materiality of the content of the statement, there can be no doubt that the absence of any suppressed facts by which the United States might be defrauded, was material to the action of the authorities. It gave them added assurance of the truth of the invoice and enabled them to assume that it was a complete statement of the truth.

It may be urged that the phrase used in this statute puts it out of the usual rule relating to perjury, and imposes a further duty. I can not see the least reason for this; the "matter material" means, I think, the subject matter or contents of the statement, not the facts to which the statement refers. It is no more than a provision that the statement shall itself be material. I do not mean that it can not be made grammatically to refer to both the statement and the true facts which the statement purported to cover, but one should interpret the law according to the custom in prosecutions for perjury and not as though it created a new crime. Nor is there the least reason for compelling the United States in this case to expose its theory of the truth or its evidence upon the assignment of perjury, which does not apply in any other case.

The assignment of perjury is not formally laid till the last paragraph of the indictment. There it is alleged that the defendant made a willfully false statement. Ordinarily this would not be enough; the false statement must be expressly indicated. However, the foregoing allegations in the indictment make it perfectly clear what the statement is. Indeed, in view of the allegations regarding the Goetz invoice, though they are evidentiary in character

and so argumentative, I might have held the assignment of perjury good without the last paragraph. It is not necessary to hold that, because the indictment as a whole leaves not the slightest doubt that the defendant is charged with a consciously false statement in respect of the absence of any suppression. It makes no difference just where the allegations occur; I am not disposed to chop logic where the intent is apparent.

Motion to quash denied.

JULY 9, 1914.

○

Supreme Court of the United States

OCTOBER TERM, 1914.

No. 506.

THE UNITED STATES,
Plaintiff-in-Error,

vs.

HERMAN A. SALEN,
Defendant-in-Error.

Brief for Defendant-in-Error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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Of Counsel.

Supreme Court of the United States,

OCTOBER TERM 1914.

UNITED STATES, Plaintiff in Error, *vs.* HERMAN A. SALEN, Defendant in Error.	**No. 506** **In Error to the District Court of the United States for the Southern District of New York.**

Statement of the Case.

The writ of error is prosecuted under the Act of March 2, 1907 (34 Stat. L. 1246) by the United States and seeks to reverse an order of March 30, 1914 of the District Court sustaining a demurrer to the 6th count of an Indictment under subsection 6 of section 28 of the Customs Administrative Act of August 5, 1909 (36 Stat. L. 95).

The review which is sought, while to a limited extent calling for a construction of subsection 6 to a greater extent and principally calls for a construction of subsection 5 of section 28 of that act.

THE SIXTH COUNT.

This count of the Indictment, is an attempt to charge the defendant Herman A. Salen, with

making a false statement in a declaration, as primary consignee, of merchandise entered at the port of New York on March 17, 1913, of which Leon Goetz of Paris was the owner and W. J. Robinson, 320 Fifth Avenue, N. Y. City, was the ultimate consignee.

We do not accept the analysis made by counsel for plaintiff in error, of the averments of this count.

The false statement charged to have been made, following the statement in the declaration that declarant presented a true entry, invoice and bill of lading is:

> "that nothing has been on my part, nor to my knowledge on the part of any other person, concealed or suppressed, whereby the United States might be defrauded of any part of the duty lawfully due on the said goods," etc.

The truth of this statement in the declaration is sought to be traversed by the averments of two things alleged to have been concealed and suppressed by the declarant at the time he made his declaration for the entry in question, to wit:

(A) Because the defendant had knowledge of certain facts putting him on notice that Leon Goetz had, on former occasions, imported through defendant, as consignee, similar merchandise at less than its foreign market values, and had failed to disclose to the collector such former delinquencies, and if such disclosure had been made it might have aroused the collector's suspicion and he might have ordered a re-appraisement and might have found the merchandise in the entry in question undervalued and therefore the suppression of those facts was something by

which the United States might have been defrauded.

(B) The other traverse of the suppression clause of the declaration averred is very much involved, extremely argumentative and hypothetical, rather than affirmative, but the pleader attempts to charge, that defendant, at the time he made the declaration in question believed that, at some uncertain time in the future, he would receive a price list from Robinson, Goetz' ultimate consignee and agent in New York, giving the prices at which said goods "had been" or "would be" sold in the United States, and that defendant believed that these prices in the United States, which this future list would disclose, would be so much greater than the foreign market prices stated in the invoice attached to the entry, that *if* that list were delivered to the collector, when it came into existence, it would excite his suspicion and lead to a reappraisement and higher valuation, and that the failure to disclose to the collector this belief about what this future list might show, was something by the suppression of which the United States might have been defrauded.

It is nowhere in the count affirmatively charged that there was actually any undervaluation of the merchandise in the consular invoice or entry of March 17, 1913. Indeed in the court below the pleader openly announced that he was breaking new ground, with this count of the indictment, for the very purpose of avoiding the necessity of proving that there was any such undervaluation or belief that there was, and contended that a wilful failure, at the time of making the declaration, to disclose *any fact*, whether required by the prescribed form to be stated in the declaration and attached papers or not, was a violation of the sup-

pression clause of the declaration, if those facts would be sufficient to excite the suspicions of the collector and might have led him to institute reappraisement proceedings, and even though there be no undervaluation or belief that there was.

The real question for construction presented in this case, is whether the "suppression clause" of the declarations prescribed by subsection 5, is limited to things suppressed which are required to be truthfully and fairly stated in the papers constituting the representation on which the entry is requested, or whether it extends to a failure to disclose every extraneous fact, which might, by any conceivable possibility, if disclosed, have excited the collector's suspicious, and lead to the institution of reappraisement proceedings. We contend for the former construction, the Government for the latter.

This requires a consideration of the substantive law and its history.

The Demurrer to the Sixth Count.

The demurrer to the 6th count (Record p. 24 to 26) states so succinctly and clearly the several grounds of its insufficiency that it is not necessary to repeat them here. Many of these are based not on statutory construction, but on plain violations of the fundamental rules of pleading necessary in all cases to advise the defendant of the crime intended to be charged and the protection of his rights.

Judge Hough's ruling on demurrer.

Judge Hough's opinion on the demurrer is contained in the memorandum filed by him (Record p. 27). He does not specifically mention that

part of the 6th count which we have designated as (B) and which is based on the alleged suppression of a belief as to the future receipt of a price list at which the goods had been or would be sold in the United States, etc.

He undoubtedly passed upon it, and considered it too uncertain, duplicitous and argumentative to need discussion, and treated it as mere surplusage. It was evidently to this he refers (p. 28) when he says

> "if all the facts stated in the 6th count were shown I cannot think it my duty to send them to a jury".

But, on the traverse of the suppression clause, which we have designated (A) which charges that the thing suppressed consisted of a failure to disclose to the collector alleged knowledge on the part of the defendant of facts which put him on notice of undervaluation by Goetz on former importations, the Judge, for the purposes of his ruling, ignored all defects of pleading and construed the count to charge that the defendant did have knowledge or belief of undervaluations by Goetz on former importations and did not disclose that fact to the collector at the time of making the declaration in question, and he squarely ruled that a disclosure of such facts was not within the purview and meaning of the suppression clause of the forms of subsection 5.

This involves a construction of subsection 5 in connection with subsection 6.

POINTS.

I.

The pertinent provisions of the statutes considered.

Sub-section 6 is either a perjury statute, or, at least, one in the nature of a perjury statute. It is highly penal. The crime defined therein being as follows:

> "Sec. 6. That any person who shall knowingly make any false statement in the declarations provided for in the preceding section, or shall aid or procure the making of any such false statement, as to any matter *material thereto*, shall, on conviction thereof, be punished by a fine not exceeding five thousand dollars, or by imprisonment at hard labor not more than two years, or both, in the discretion of the Court." (Italics ours.)

Sub-section 5 prescribes four forms of declarations in stereotyped language, which are to be made and presented to the Collector, at the time of the entry of imported merchandise by the importer, owner, manufacturer, agent or consignee, as the case may be, the forms varying to fit the category in which the declarant stands, in that respect, to the goods.

The first time any form of declaration was prescribed appears in the Act of Congress of March 22, 1799, Ch. 22, Sec. 36, (1 U. S. Statutes, p. 656).

There was but one form prescribed, which was to cover the declaration whether made by an "importer, agent or consignee."

The form opens with a statement of the papers presented to the Collector,—the written entry, the invoice and the bill of lading,—and the correctness

and truthfulness of the same. Then follow other details, and, at the bottom of the form, the suppression clause is as follows:

> "I also swear (or affirm) that nothing has been concealed or suppressed *in the entry aforesaid*, whereby to avoid the just payment of the duties imposed by the laws of the United States, and that all matters are truly expressed therein according to my best knowledge and belief." (Italics ours.)

In the Act of March 1, 1823, Section 4, this form was split up into three forms. The first of which was for use by a consignee or agent, (irrespective of whether the goods were purchased or otherwise acquired). The second was for use when the declarant was the owner, (irrespective of how the merchandise was acquired), and the third for use when the declaration is made by a manufacturer.

The essential features of these three forms, as affects the suppression clauses prescribed in the Act of 1823, were carried into Sec. 2841 R. S.

U. S. *v.* Auffmordt, 122 U. S., 197-204.

And, we may add, into the Customs' Administration Act of June 10, 1890, (26 Stat. L. 132), and Customs Administrative Act of Aug. 5, 1909, (36 Stat. I p. 94).

An examination of forms (2) and (3), prescribed for declarations of owners and manufacturers, by Sec. 4 of the Act of 1823, will show that the arrangement of the details, required to be stated, follow the arrangement in the original form prescribed in the Act of 1799, viz., the suppression clause is made an independent clause placed at the end of the form, and is limited to things suppressed "in the entry and invoice."

Counsel for plaintiff in error, in his brief, referring to that statute, *fails to direct the Court's attention to this fact*, which is highly important in the construction of the scope of the suppression clauses in all these forms.

The first form, prescribed in Sec. 4 of the Act of 1823, which covered the case of declarations by consignees and agents only, made a re-arrangement of the details to be set out in the form, different from what it was in the form prescribed by the Act of 1799 which covered all declarations. These changes were made necessary to conveniently state, in succinct language, the things specially required to be stated by a consignee or agent. The suppression clause was not placed at the bottom of the form but immediately after the statement that the declarant presented his written entry, invoice and bill of lading, and that they are true; he was then required to state:

> "that nothing has been, on my part nor to my knowledge, on the part of any other person, concealed or suppressed whereby the United States may be defrauded of any part of the duty due on said goods."

The words "in said entry or invoice" are not added, but the language used is immediately followed by the statement:

> "and that, if, at any time hereafter I discover any error *in the said invoice, or in the account now rendered* of the said goods, wares and merchandise, or receive any other invoice of the same, I will immediately make the same known to the Collector of the District." (Italics ours.)

Under the frame of the form and the environment in which the suppression clause is thus placed, there can be no other reasonable conclusion

than it is to receive the same construction as the suppression clauses of the other two forms of the same Act, viz., that it relates to things suppressed, which should have been fairly stated, in the written entry (the account of the merchandise) and in the invoice attached. The insertion of the words "in said entry and invoice," was unnecessary because they are necessarily implied from the context.

The word "suppressed," as there used, necessarily implied a reference to an antecedent statement in which there was an "expression" of things disclosed. In the forms (2) and (3) the suppression clause being separated from the antecedent representation and following the old form of the Act of 1799, it might have given rise to misconstruction, as in the present case, if the limiting words "in said entry and invoice" had been omitted. The only difference, between the two suppression clauses of those two forms and that in the form of the Act of 1799, was to take in things suppressed in the invoice as well as in the entry.

Substantially the same three forms were repeated in the Customs Act of June 10, 1890, (26 Stat. L. 132).

That Act, as in all the preceding Acts, provided but one form in which the declaration is to be made by a consignee or agent, whether the merchandise was purchased or otherwise obtained.

In the Customs Act of August 5, 1909, the form of declaration, previously prescribed for consignees or agents, was split into two forms, which appear in order of sequence in Sub-Sec. 5 as the first and second forms. The first being applicable to merchandise actually purchased, the other to merchandise not actually purchased.

In the matter of the suppression clause, these two forms, into which the first form was split, fol-

lowed the exact language of the first form prescribed by the Act of March 1st, 1823.

In arriving at the true intent of the language of these forms, on the subject of suppression, we are carried back to the similar forms prescribed by the Acts of March 22, 1799 and March 1st, 1823.

In the forms prescribed by the latter act, the declarant is required to state, in the declaration, that he presents therewith to the Collector with his written entry, the true invoice and bill of lading, that he knows of no other, and, immediately following this statement, constituting the representation in the first form of the Act of 1823 and in the two forms into which that original form was split by the Act of 1909, the declarant is required to state:

> "*That nothing has been on my part nor to my knowledge on the part of any other person, concealed or suppressed, whereby the United States may be defrauded of any part of the duty lawfully due on the said goods, wares and merchandise;* that the said invoice and the declaration therein are in all respects true, and were made by the person by whom the same purport to have been made; and that if at any time hereafter I discover any error in the said invoice, or in the account now rendered of the said goods, wares and merchandise, or receive any other invoice of the same, I will immediately make the same known to the collector of this district." (Italics ours.)

In the last two forms, as well in the Act of 1823 as in the Act of 1909, the suppression clause is in the following language:

> "I do further solemnly and truly (swear or) declare that I have not *in the said entry or invoice* concealed or suppressed anything whereby the United States may be defrauded

> of any part of the duty lawfully due on the said goods, wares and merchandise," etc. (Italics ours.)

From this it will be seen that certainly in the last two forms the "suppression" referred to relates wholly to things concealed or suppressed *in the written entry and invoice.* It obviously means things relating to the character, quantity, quality or cost of the goods, or other facts concealed or suppressed which should have been fairly stated in the invoice or written entry constituting the representation, and by the acceptance of which the collector might be deceived, and thus the United States might be defrauded.

In *U. S.* vs. *Wood*, 14 Peters, 430, the defendant was indicted for perjury in falsely taking and swearing

> "the owners oath in cases where goods have been actually purchased"

as prescribed by the second form of Section 4 of Act of March 1, 1823, the substance of the charge was:

> "That the said goods had in fact cost more than the prices stated in the said entry and invoice and that in entering said goods he had intentionally concealed and suppressed the true cost thereof."

The Court, sustaining the conviction, said (p. 443):

> "The importer is required to swear that the invoice produced by him contains a just and faithful account of the actual cost of the goods; and that he has not *in the invoice concealed or suppressed* anything whereby the United States may be defrauded of any part of the duties lawfully due on the goods, etc."

> * * * The defendant, in his entry, *did it upon an invoice*, sworn to by him to contain a just and faithful account of the actual cost; and there was nothing in it concealed or suppressed.
>
> He is charged with having sworn falsely in respect to the cost of the goods contained in the invoice by which he made his entry of them." (Italics ours.)

This appears to be the only case reported, in which a prosecution has been had based upon the suppression clause of the declaration. While it was framed upon the second form of Sec. 4 of the Act of 1823, which expressly limited the suppression to things suppressed in the written entry and invoice, it is strongly persuasive of the general scope of that clause in each of the three forms. *The opinion bases the suppresssion upon the thing constituting the representation upon which the entry was made*

In *U. S.* vs. *Auffmordt*, 122 U. S. 197, a forfeiture was claimed of goods entered here by a consignee of a foreign manufacturer, among other things because the manufacturer invoiced the goods at the fair market value at the place of manufacture, which was lower than its actual market value, at the time and place of exportation.

The Court, Judge Blatchford delivering the opinion, said (p. 204):

> "Section 2839 provides for the forfeiture of merchandise, or the value thereof 'to be recovered of the person making entry' where the merchandise is 'not invoiced according to the actual cost thereof at the place of exportation with design to evade payment of duty.' This section originally enacted in 1799 is applicable only to goods which are required to be invoiced according to their actual cost at the place of exportation."

The court then reviews the history and provisions of the several forms of declaration, and concludes on that subject (p. 206) as follows:

> "It is quite clear, from the above provisions, that, where imported goods are the property of their manufacturer, the invoice need only state the fair market value of the goods at the place of manufacture, *and need not* state, the actual cost thereof at the place of exportation. Therefore an invoice of goods which belong to their manufacturer is not, *nor is an entry of such goods, within the purview of Sec. 2839*, so as to make the person entering them with design to evade payment of duty liable to a forfeiture of their value." (Italics ours.)

Section 2839 R. S. was repealed by the Customs Administrative Act of June 10, 1890, Ch. 407-26 (Stat. L. 141). In its place was substituted subsection 6 which prescribed punishment or forfeiture for making "any" false statement in the declaration *material* thereto.

Subsection 3, of the Acts of 1890 and 1909, changed the requirement so that the manufacturer was required to state the actual market value in wholesale quantities at the time and place of exportation, and by subsection 8 the manufacturer is required to furnish a statement, in addition to the above invoice, "declaring the cost of production of such merchandise". But it is nowwhere required that either he or his consignee shall furnish a statement of the selling price of the goods in this country.

The indictment in the case at bar, does not charge that the goods entered were manufacturer's goods. But if it did, there was no requirement that the selling price in this country should be disclosed. Notwithstanding these

changes in the statute, the *Auffmordt* decision is as pertinent now as it was then on the point, that a disclosure of things relating to values at other times and places not provided to be disclosed by the forms prescribed—such as the value or selling price in this country—are not within the purview of the statute, and hence cannot be made the basis of forfeiture much less of criminal prosecution for suppression. They are not "material" to the declaration.

Case Distinguished.

U. S. v. *Cargo of Sugar, 3 Sawyer, 46.*

Counsel for Plaintiff-in-error quotes an extract from the charge of Hoffman, J., to the jury, as if it supported the contention made by the Government in the present case.

That was a suit brought to forfeit sugar which had been entered, where the importer mixed the sugar with charcoal to change its color for the purpose of reducing its grade, and which was entered by the importer at a lower grade than that fixed by the Dutch standard in color.

The prosecution was under Sec. 1 of the Act of 1863 (Sec. 2864 R. S.) which made the goods forfeitable where the owner or agent knowingly makes or attempts to make an entry thereof by means of any false invoice, or certificate, or of any invoice which does not contain a true statement of all the particulars required or by means of any other false or fraudulent document or paper or of any other false or fraudulent practice or appliance.

The thing which made the entry fraudulent in that case, was the suppression and concealment of a fact which the Judge very properly held should have been disclosed in the entry and invoice, viz.,

the intentional concealment of facts which would have disclosed the true quality and value of the goods. It made no difference that there was no specific requirement that the color of the sugar should be stated in the invoice or entry, but, as the judge pointed out, the duty was to be assessed by the color standard, and to artificially change the color, for the purpose of concealing in the invoice and entry, the character and quality of the goods, was undoubtedly the suppression and concealment of a fact which should have been fairly stated in the entry and invoice. It was to the facts in the case to which the language used by the Judge is to be applied. It has no application to the question raised in the case at bar, which undertakes to bring into the intendment of the suppression clause matters *dehors* that which good faith and fair dealing would require to be stated in the entry and invoice.

II.

The things alleged to have been suppressed, were not "material" to the declaration within the meaning of the statute.

A.

The scheme of the statute in respect to disclosures from declarants.

Under subsection 5, the declarant initiates the proceedings for entry by making a declaration in the prescribed form, attaching the consular invoice made out in the foreign country, the written

"entry" giving the particulars of the merchandise the foreign cost or foreign market value, and the bill of lading.

In this first step he must state truthfully and fairly certain things required to be stated. He is not even given the opportunity, in the form prescribed, to disclose extraneous facts. The things required to be stated relate solely to the truthfulness of the papers required to be presented: the foreign value or cost of the goods, their description, the ownership and shipment of the goods.

The collector may or may not be satisfied with the papers, and if so the statute provides the method by which he can obtain further disclosures.

Under subsection 15 of the Act of 1909 (substituted for Section 2922 R. S.) the appraisers are given power, subsequent to the declaration, to summon the importer, agent or consignee as the case may be, and call upon him to make further disclosures, and under subsection 11, if the exceptional conditions therein stated arise, *only then can he be called upon to even speak to the selling price in this country.*

There is no averment in the indictment that defendant had been called upon under subsections 15 or 11 to make disclosures of the facts charged to have been suppressed.

In *United States* v. *Doherty*, 27 F. R. 731 (S. D. N. Y.) Judge Brown in passing upon the authority of appraisers, under Section 2922, R. S., to have importers, consignees, etc., appear before them and make statements bearing upon the assessible value of merchandise, said:

> "There are many elements that enter into an agreement made in a foreign country for the delivery of goods at a future time in New York, at a New York price, that make the New York price no criterion of the market

> value in the principal markets of a foreign country at the time of exportation. By making various allowances and deductions, as for interest, for freight, for differences of time, changes of circumstances, and possible fluctuations in the market prices, some approximation, doubtless, to the presumptive foreign market value at the time of exportation might be arrived at. But that is resorting to very roundabout and uncertain methods, which are neither reasonable nor justifiable except upon the failure of proper means of inquiry. It is for these reasons that such evidence is ordinarily legally incompetent. It is rejected by the courts, not upon any formal or technical grounds, but because of its irrelevancy, remoteness, and uncertainty; *and the same objections are as applicable upon an appraisement as upon a judicial trial.* In either case there must be proof of special circumstances to make it reasonable and competent; and there was no such proof here" (italics ours).

In *U. S.* v. *Calhoun*, 184 F. R. 499-504, the question was on the effect of a refusal of an importer to answer certain questions as to value of goods entered on proceedings by a collector to reliquidate dutiable values after an appraisement. Hand, J., said:

> "Therefore even assuming that the collector could issue this citation upon a re-liquidation the scope of his inquiry did not include a reappraisal. If it was not material, Calhoun need not have answered it. *U. S. v.* Doherty (D. C.) 27 F. 730".

The case of *Gulbenkian* v. *U. S.*, 153, F. R. 858, C. C. A. 2nd Circuit (1907) which arose under a reappraisement, was decided under Tariff Act 1890 and amendments of 1897, which contained the same provisions as Subsection 11 of the Act of 1909. It was not a proceeding under subsection

11 nor is the proceeding here under subsection 11, and the court in that case said:

> "The proof shows that it was not worth more, and a finding to the contrary must either be wholly arbitrary or based upon facts which the statute excludes from consideration, viz: *value in this country*".

And the Court said:

> "*The value of the wool here* or in foreign countries, other than Turkey, the use to which the wool was to be put, the object of the purchaser in separating it, *are all in our judgment matters extraneous to the issue*" (italics ours).

Counsel for Plaintiff in error in his Brief (p. 22) argues that, because by subsection 15 of the Act of 1909 the appraisers are given the power to cite the importer, agent or consignee and examine him, respecting the dutiable value or classification of the merchandise, that therefore every possible relevant fact which might be material in such a proceeding, necessarily was "material" to be disclosed in the original declaration, and the importer is guilty of fraudulent suppression if he has not disclosed, in his declaration, all such facts relevant to the special inquiry.

This argument is fallacious. It assumes that all evidence, competent on the special proceeding, is required to be voluntarily disclosed in the declaration, notwithstanding the fact that the extent of the disclosures in and at the time of making the declaration as fixed by the forms prescribed by the statute itself and the special proceedings, are different.

But counsel for plaintiff in error admits that even under subsection 15 the questions must "be

relevant to the subject matter" and cites *U. S.* v. *Doherty*, 27 Fed. 730, *the very case in which the court held, that even on such an inquiry, questions relative to the selling prices in this country were irrelevant.*

But whether relevant on a special inquiry under subsection 15 or Section 2922 R. S. or not, such facts are certainly immaterial to the declaration, the form prescribed for which does not require that they should be disclosed.

Counsel for plaintiff in error in his brief (p. 22,), further says:

> "Information whether an importer had been engaged in a long line of prior revenue frauds was clearly such as would aid the appraisers in ascertaining the value of the shipment in question, as it would put them upon close scrutiny of the invoice and other facts surrounding it".

And on page 26, he squarely takes the position that:

> "It is not necessary to allege in the indictment or to prove that the United States was actually defrauded of duties. It is only necessary to allege facts calculated to deprive, or of a character which might deprive the United States of such duties".

The contention of counsel amounts to this, that failure to disclose to the collector any fact of whatever character, which could reasonably be held to excite his suspicion, such as that defendant or the assignor had smuggled on former occasions, would make him guilty of suppression because it was a fact of a character to deprive the United States of duties, *even though there was no undervaluation and the failure to make such*

voluntary confession of past sins was the only alleged wrong done.

This puts the contention, in regard to what the count attempts to charge, just where Judge Hough puts it, and we think reduces it to an absurdity.

We do not contend of course that it must be charged that the Goverment was actually defrauded, but we do insist that the suppression charged must be of some fact within the scope of the things required to be disclosed by the form of declaration prescribed, and which by fair intendment should be fairly stated in the entry and invoice. It is not enough that there should be merely an omission to state extraneous facts which might be sufficient to excite the collector's and appraiser's suspicions, and where neither actual undervaluation or intent to undervalue the goods is charged.

At pp. 26 and 27 of his brief, counsel for plaintiff in error contends that it is neither necessary to allege or prove "an intent" to defraud, under sections 5 and 6, and forfeiture cases are cited under subsection 9 of the Act.

We think that it is well settled, under the weight of authority, that the importer is not guilty of a criminal offense under subsection 9 even though the entry is based upon invoices in which the *consignor* has falsely and fraudulently misstated the cost or values, unless the *importer* knows or believes that they are so false and fraudulent, and even though the use of such false entry and invoice should result in depriving the United States of a portion of its duties.

> U. S. *v.* 1150½ Pounds of Celluloid, 82 Fed. 627-633 (C. C. A. 6th Circuit, Lurton, J.)

581 Diamonds *v.* U. S., 119 Fed. 556-60, (C. C. A. 6th Circuit, Day, J.)
U. S. *v.* Bishop, 125 Fed. 181, (C. C. A. 8th Circuit, Sandborn, J.)
U. S. *v.* 99 Diamonds, 139 Fed. 961, (C. C. A. 8th Cir. Sandborn, J.)
U. S. *v.* 75 Bales Tobacco, 147 Fed. 127, (C. C. A. 2nd Cir.)
U. S. *v.* One Silk Rug, 158 Fed. 974-976, (C. C. A. 3rd Cir.)

Judge Brown (D. C. So. Dist. N. Y. 1898) held that a forfeiture of the goods may result in such case, but indicated that it would not apply to a criminal prosecution under the statute.

U. S. *v.* 9 Bales Tobacco, 112 Fed. 779-781.

This case is distinguished, even as to forfeitures, in the opinion of the Circuit Court of Appeals, 2nd Circuit in

U. S. *v.* 75 Bales Tobacco (*supra*).

Counsel for plaintiff in error in his brief (p. 23-26) further contends that because evidence of former fraudulent transactions is admissible on the trial of a case to prove guilty knowledge and intent, that therefore failure to disclose former guilt was a fact suppressed in making an entry in every other respect fair and honest.

The rule of evidence has never been extended to make the proof of a prior crime, proof of the commission of a subsequent crime.

The rule of evidence is totally inapplicable to the question under consideration. The argument simply emphasizes the fact that the Government is contending for such an unlimited extension of

the meaning of the suppression clause, as to reduce it to an absurdity.

If the value of the goods in this country were so irrelevant on a proceeding for reappraisement under Section 2922 R. S. and under reliquidation proceedings, that the importer cannot even be compelled to answer questions relative to such selling price, how can it be successfully contended that he is guilty of a suppression *material* to his declaration under subsection 5, in failing to disclose *a belief* in what the future selling prices in this country would show? Or how could it be material to the declaration of March 17, 1913, that defendant should disclose a belief in undervaluations made by the consignor on former importations or knowledge of the same, alleged argumentatively, to have been acquired only from the high prices at which the goods had been sold in this country?

There is no averment in the indictment that the things alleged to have been suppressed were material to the declaration. This is a fatal defect unless the materiality appears from the averments.

Markham *v.* United States, 160 U. S. 325.

As applied to the suppression clause of the declaration, we understand that the words in subsection 6 "as to any matter material thereto" refers to the materiality of the facts required to be fairly and truthfully disclosed in the declaration, the entry and invoice, which constitute the representation required to be made by the forms prescribed.

That view is within the spirit of the construction of these forms required by Section 2769 R. S.

It is not answered by the mere statement that the suppression clause is itself a material part of the declaration. It is not enough to charge that

the defendant declared falsely when he said he knew of nothing suppressed, but the count must charge the particular fact he did know, which it is claimed he suppressed, and that fact, when charged, must be within the scope of the things required to be disclosed before it can be "material" to the declaration.

B.

Suppression, by which the United States "may be defrauded", is limited to things within the scope of the disclosures required to be made in the stereotyped form of declaration and papers attached, constituting the representation.

There are no averments in the 6th count of the Indictment, which challenge the correctness or truthfulness of the invoice, bill of lading or written entry attached to the defendant's declaration, nor is it charged that the foreign market value of the goods was understated, or that any of the things, required to be disclosed in the declaration itself, were not disclosed. These were all the things which the prescribed form required should be disclosed and constitute the representation upon which the collector was to be requested to act. On principle, even if we did not have the enlightenment of forms (4) and (3) of subsection 5, which expressly limit the suppression to things concealed or suppressed in the written entry and invoice, we would still have to limit the suppression clauses in forms (1) and (2) to the things suppressed in the papers constituting the representation required to be made.

The language of the suppression clause of each form, is limited to things concealed or suppressed,

"whereby the United States may be defrauded" of the duties on the particular goods.

It is fundamental that there can be no fraud without a representation, express, or implied, where there is a duty or obligation imposed upon the party to speak.

> "Fraud consists of some deceitful practice or *wilful device* resorted to with intent to deprive another of his right or in some manner to do him an injury." (Italics ours.)
>
> Black's Law Dict.

> "The fraud which gives rise to an action of deceit exists where a person makes a false representation of a material fact susceptible of knowledge, knowing it to be false, or as of his own knowledge when he does not know whether it is true or false, with the intention to induce the person to whom it is made, in reliance upon it to do or refrain from doing something to his *pecuniary hurt;* when such person, acting with reasonable prudence, is thereby deceived and induced to so do or refrain, to his damage." (Italics ours.)
>
> 20 Cyc. 10.

> "As a general rule mere non-disclosure of facts known to the defendant, even though such disclosure would deter prosecutor from parting with his property, is not a false pretense."
>
> 19 Cyc. 403, 404.

To constitute something, therefore, by which the United States may be defrauded of the duties on the particular entry, it must be something misstated in the papers constituting the representation referred to in the declaration, or something suppressed therein which declarant was called upon to therein state fully and fairly.

The Government cannot complain of a failure to disclose matters which in the form prescribed it makes no provision for disclosing, if that which is prescribed be fairly and honestly disclosed.

That would be true even if there were facts extraneous to those required to be disclosed in the papers constituting the representation,—such as declarant's knowledge that the consignor had a bad character, or that similar goods had sold at very high prices in this country—facts which if disclosed, might excite the collector's suspicion, and might cause him to order a reappraisement and cause the appraiser to appraise the goods at a higher valuation. Such appraisement or reappraisement or ascertainment of value by the collector is not made conclusive by the statute (subsection 14).

The possibility of his making such a finding by reason of having his suspicions so aroused by such extraneous matters, does not negative the statement in the declaration, entry and invoice that the true foreign cost or values were there stated, or that declarant so believed. Nor would it impose the duty upon declarant to unjustly arouse the collector's suspicions by disclosure of such extraneous facts not required to be stated, and which declarant does not believe affect the truthfulness and fairness of the valuations stated in the invoice and entry for which the declaration is made.

The forms of declaration prescribed by section 2841 R. S. as well as section 2769 R. S. appear under Title 34 R. S. The latter section provides:

> "In cases where the forms of official documents, as prescribed by this Title, shall be substantially complied with and observed, according to the true intent thereof, no penalty or forfeiture shall be incurred by a deviation therefrom".

The spirit of that statute is that a true and fair disclosure of the things required to be disclosed and within the purview of the representations required to be made, is sufficient.

If the things suppressed, within the meaning of the statute, are not limited to the scope of the papers constituting the representation, then there is no limitation, and no declarant could make a declaration in the prescribed form without great peril. He would be forced to voluntarily supplement it by a written statement enumerating every conceivable fact which might thereafter be adjudged sufficient to have excited the collector's suspicions and lead to reappraisement proceedings. If he had formely been guilty of smuggling, but had reformed, he would have to confess that. Even then he would not be safe because some extraneous fact which he might deem of no consequence might be a circumstance held to be sufficient to have excited the collector's suspicions if disclosed. Every American merchant who happens to obtain high prices for his goods in this country, would, at his next entry, be obliged to voluntarily disclose a list of his former sales and prices to the collector, because, if disclosed, the facts might excite the collector's suspicion and lead to the institution of reappraisement proceedings.

This court will not give the statute a construction which would place declarants in such an unfair situation, and make the statutory forms prescribed, a snare to entrap those who rely upon their sufficieney.

> "Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and if

possible, so as to avoid an unjust or absurd conclusion."

Hawaii *v.* Mankichi, 190 U. S. 197, 214.

Especially is this true where such a construction would punish, as a "fraud," the failure to disclose that which the statute does not require to be made part of the representation on which the action of the opposite party is requested, and which therefore lacks the essential element of fraud at common law.

Words used in a statute by which they are not defined are given the same meaning as at common law.

Swearingen *v.* U. S., 161 U. S. 446-451.
Keck *v.* United States, 172 U. S. 434-446.

CASE DISTINGUISHED.

Mutual Life Ins. Co. v. *Ocean Ins. Co., 107 U. S., 485.*

This case is cited by the plaintiff-in-error as sustaining, by analogy, the proposition that the declarant must disclose in his declaration every conceivable fact which *might* influence the Collector in ordering a re-appraisement, even though there be no actual undervaluation and a truthful, fair statement, of all things required to be disclosed in the prescribed form, invoice and entry, has been made.

The issue in that case was, whether the minds of two insurance companies met when one, effecting a policy of re-insurance with the other, disclosed the existence of only one charter party, whereas there were two. The language of the Court quoted by opposing counsel was entirely

applicable to the facts, which themselves distinguish that case from this.

On the proposition which counsel thus raises by citing this case, we call attention to the diametrically opposite rule which applies in cases where the insurer prescribes the form and substance of an application to be subscribed by the insured, stating the particular disclosures sought to be made.

> "The rigid rule of marine insurance, requiring the fullest disclosure of facts relating to the risk, has been further modified in life insurance by the doctrine that a policy is not necessarily avoided by failure to disclose facts, if no inquiry was made to elicit them. This rule is well stated in Rawls *v.* American Mutual Life Ins. Co., 27 N. Y., 282; 84 Am. Dec. 280, wherein the court said that the mere omission to state matter not called for by a specific or general question would not be concealment, and that, where the insurers have framed and put to the insured a series of questions calling for such information as they desired, they cannot avoid the contract because the insured did not go further and state what was not called for. Such, too, is the rule laid down in Penn. Mut. Life Ins. Co. *v.* Mechanics' Savings Bank & Trust Co., 72 Fed. 413, 19 C. C. A. 286, 38 L. R. A. 33, after a full discussion of the subject."
>
> Cooley-Briefs on Insurance, Vol. III, pp. 2011-12.
>
> The Mercantile Mutual Ins. Co. *v.* Folsom, 18 Wall., 237-253.

In the case last cited this Court cited with approval and affirmed the doctrine enunciated in *Rawls* v. *American Mutual Life Ins. Co.*, 27 N. Y., 282, to the effect that when all the questions put to the parties desiring insurance are fully and

truly answered, it is not a fraudulent concealment if they omit to state facts, though material to the risk, not called for by any specific or general question.

C.

The omission, in the suppression clauses in forms (1) and (2) of sub-section 5, of the words "in the said entry or invoice", was not intended to enlarge the scope of those clauses beyond the meaning of the suppression clause of forms (3) and (4).

We are not unmindful of the rule of construction that where similar provisions occur in independent clauses of the same statute, and a limiting word is used in one and omitted in the other, that such difference, standing alone, raises the presumption of a legislative intent to take off the limitation from the clause from which it is omitted. But this like all rules of construction is subservient to another and more important rule, which is that the limiting words must be read in where omitted, to conform to the clauses *in pari materia* when the scope and purpose of the whole act shows that such limitation was intended.

> "In construing statutes, it is not only our duty to give effect to all words used in their ordinary sense, but to eviscerate, if possible, their true spirit and intent from all the connected circumstances attendant or subsequent as well as preceding. Bond *v.* Hoyt, 13 Pet., 273; 1 Kent's Com. 461."
>
> Lawrence *v.* Allen, 7 How. 793.
>
> "And it is well settled that, in interpreting a statute, the court will not look merely to a particular clause in which general words

> may be used, but will take in connection with it the whole statute (or statutes on the same subject) and the objects and policy of the law, as indicated by its various provisions, and give to it such a construction as will carry into execution the will of the Legislature as thus ascertained, according to its true intent and meaning."
>
> Brown *vs.* Duchesne, 19 How., 183.

In *Atkins* vs. *Fiber Disintegrating Co.*, 18 Wall., 272, the question was whether an admiralty suit was a "suit of a civil nature" within the meaning of the prohibition in the judiciary act against bringing suits in districts of which the defendant is not an inhabitant. This Court said:

> "It may be admitted that an admiralty case is a civil suit in the general sense of that phrase. But that is not the question before us. It is whether that is the meaning of the phrase as used in this section; * * * In cases admitting of doubt the intention of the law maker is to be sought in the entire context of the section, statutes or series of statutes *in pari materia* (citing authorities)."

The Court then by examining the preceding as well as the subsequent provisions of the Act, read into the provision in question a limitation which made it applicable only to suits at common law or in equity.

In *Pollard* vs. *Bailey*, 20 Wall. 520, the court by construction read into the clause of a state banking law creating a liability of stockholders, a limitation by intent gathered from a subsequent provision of the same Act. The Court said:

> "The intention of the Legislature when properly ascertained, must govern in the construction of every statute. For such pur-

pose the whole statute must be examined. Single sentences and single provisions, are not to be selected and construed by themselves but the whole must be taken together."

In *Petri* vs. *Commercial Bank*, 142 U. S., 644-650, this Court said:

"The rule that every clause in a statute should have effect, and one portion should not be placed in antagonism to another is well settled; and it is also held that it is the duty of the court to ascertain the meaning of the Legislature from the words used and the subject matter to which the statute relates, and to restrain its operation within narrower limits than its words import, if the court is satisfied that the literal meaning of its language would extend to cases which the legislature never intended to include in it" (Citing cases).

Quoted with approval in:

McKee *v.* U. S., 164 U. S., 287-293.

In *Smith* vs. *The People*, 47 N. Y. 330-331, the Court said:

"But it is equally well settled that words absolute of themselves and language the most broad and comprehensive may be qualified and restricted by reference to other parts of the same statute in which they are used, and to the circumstances and facts existing at the time, and to which they relate or are applied."

"So, though one section of the 3 Geo. 4 c. 39, made a warrant of attorney to confess judgment, if not filed within 21 days, 'fraudulent and void against the assignees' in bankruptcy of the debtor and another made it 'void to all intents and purposes' if the de-

> feasance was not written on the same paper as the warrant, it was held, notwithstanding the dissimilarity of the language, *that the latter section was not more extensive than the former,* but made the warrant of attorney void only as against the assignee".
>
> Endlich on the Interpretation of Statutes, Sec. 378, p. 528.
> Morris *v.* Mellin, 6 B. & C. 446.
> Bennett *v.* Daniel, 10 B. & C. 500.
> Bryan *v.* Child, 1 L. M. P. 429.
> Myser *v.* Veitch, L. R. 4 Q. B. 649.
> R. *v.* Tone, 1 B. & Ad. 561.

When we examine the suppression clause in form (1) of Sec. 4 of the Act of March 1, 1823, and in forms (1) and (2) in sub-section 5 of the Act of 1909, into which the original consignees form was sub-divided, we see that the context itself naturally limits the things suppressed to things which should be fairly stated in the papers as presented to the Collector in the antecedent part of the same paragraph, viz., the invoice attached and written entry, and possibly the bill of lading. Especially since the suppression clause is immediately followed by the further statement

> "that the said invoice and the declaration therein are in all respects true, and were made by the person by whom the same purports to have been made".

But when we examine forms (3) and (4) of sub-section 5 of Act of 1909, corresponding to original forms (2) and (3) of the Act of 1823, which are declarations to be made by owners or manufacturers, we see that the frame of the forms is changed so as to introduce additional matter between the enumeration of the papers constituting

the representation which appears in the first part of the form, and the suppression clause which appears at the end. It was this rearrangement, made necessary by the introduction of additional matter to fit the different character of declarant, and consequent separation, which made it necessary to introduce in the suppression clause the additional words "in the entry and invoice", to prevent the very misconstruction now placed by the plaintiff-in-error upon forms (1) and (2). It did not seem possible under the frame of forms (1) and (2) that such a misconstruction could arise. In fact the statute has been in force nearly one hundred years without its having heretofore arisen. No sound reason can be suggested why, when the owner or manufacturer makes the declaration, he is not guilty of suppression except for things not fairly disclosed in the invoice and entry, while if made by a consignee, the latter is guilty of suppression if he does not voluntarily confess all his past sins, and report every conceivable fact which might excite the Collector's suspicions.

Opposing counsel contends (Brief, p. 19) that nothing is added to what is already required in forms (1) and (2) if the words "in said entry" are read into them evidently seeking a justification for the argument of Judge Hand (Rec., p. 30) that

> "to interpose these words makes nonsense if only the declarant is to swear to it".

The answer is simple and obvious: Congress used words of similar limitation in its original enactment on this subject, which then covered the case of every importer, regardless of the relation which he occupied in respect to the merchandise imported, and continued the limiting words in all

of its subsequent enactments in those forms made applicable to owners and manufacturers.

It follows that if these limiting words add nothing by interposition in forms (1) and (2) (consignees) and makes nonsense, the same must be true of the presence of those worls in forms (3) and (4) (owners and manufacturers)—a result not only absurd but entirely illogical.

The fact that the interposition of these words in forms (1) and (2) produces the same result as their use in forms (3) and (4) by restricting the suppression and concealment to the entry and invoice, demonstrates the necessity of adopting a construction as to forms (1) and (2) in harmony with (3) and (4), especially in the absence of any intent upon the part of Congress to remove that limitation when applied to consignees or agents.

The absence of any apparent valid reason is strong evidence that there was no such legislative intent.

Petri *vs.* Commonwealth, 142 U. S., 650-1.

But if the omission of the words "in the entry and invoice" from the first two forms, can be construed into a legislative intent to broaden the suppression clause beyond the scope of the limitations imposed by the use of those words in the suppression clauses of forms (3) and (4), still it does not follow that the language used is to have no limitations whatever and is to be construed as if freed from its environment. The things suppressed must be of the character of thing required to be disclosed, under the rule *noscitur a sociis*. And under the rule *ejusdem generis*, of like kind to the things made the subject of suppression by forms (3) and (4), that is, things suppressed in the papers constituting the repre-

sentation, such as in the entry or invoice. That would extend the intent of the suppression clause beyond the written entry and invoice, to the bill of lading and to any facts not truthfully or fairly stated and disclosed in the declaration itself which are required to be therein stated.

It is contended by plaintiff-in-error that the suppression clause, although a statement of a negative fact, is itself a representation. That is true. But the question is to what does it refer, if not to the previous representations enumerated?

Not to so limit the clause, would ignore the whole purpose and design of the declaration, the scheme of the Act in regard to the matters required to be disclosed in the declaration and the other provisions of the Act providing for the time, place and circumstances under which further disclosures may be required. It would place a construction upon one clause of the forms, which would make the forms themselves absolutely insufficient to protect the declarant who faithfully complies with all its requirements, against prosecution for failure to voluntarily disclose facts which might possibly, if disclosed, lead to proceedings for re-appraisement. It would impose a burden of unfairness upon all declarants which it cannot be assumed Congress ever intended. As expressed by the trial judge it would, as charged in this case, make a declarant guilty on making a true entry, because he failed voluntarily to disclose his guilt on former entries. It does not seem possible that one imbued with the spirit of our institutions could contend that the Congress of 1823 had such an intent.

The fact that no such contention was made during the past one hundred years by any prosecuting officer is strong evidence against the unsound-

ness of the contention as well as the want of any public necessity for invoking it.

If there is a wilful undervaluation that is punished by sub-section 9 of the Act. If there is a presentation of false papers to obtain entry, or any false statement of fact or wilful suppression of facts which ought to be fairly stated in the invoice or entry, this is punished by sub-section 6. If none of these exist, then the United States cannot be defrauded. If notwithstanding this, by innocent mistake or error, any undervaluation should occur, the Government is protected by its civil remedies, to collect assessed penalties or unpaid duties.

III.

So much of the sixth count which charges the suppression of a "belief" in the happening of a future event is argumentative, uncertain, hypothetical and duplicitous and was properly treated by the trial court as surplusage.

The charge in the count relative to a belief in the sale of the merchandise embraced in the entry of March 17, 1913, is contradictory and uncertain. At page 19, it is charged defendant believed that

> "*as to the merchandise referred to in the said declaration and as to all the series of previous shipments*"

there was suppressed a discrepancy between the prices stated in the consular invoices,

> "and the prices at which the merchandise *was sold* in the United States."

It is then charged (at the lower part of page 19)

> "And as to the merchandise covered by said declaration"

defendant believed that he *would receive* a list of the prices at which the said merchandise

> "*had been or would be sold* in the United States"

by said Robinson or by said Goetz, showing such high prices, etc.

The two statements are conflicting as to whether the defendant believed the goods covered by the particular entry had already been sold or whether they would be sold, rendering it uncertain as to what it is expected to be proved defendant did believe. And it is a failure to disclose this belief which is sought to be charged as a crime.

The charge is defective for ambiguity, duplicity and uncertainty. This is so offensive to the well-known rules of common law pleading that it is unnecessary to cite authority. Nor is it any better under statutory pleading.

U. S. *v.* Carll, 105 U. S. 611.

Moreover, it is charged as a belief based upon an uncertain event that (p. 20),

> "*if* the said list or statement were delivered"

to the collector, he would acquire knowledge, from the hypothetical list, stating the selling price in this country, that the foreign market values stated in the consular invoice were false and fraudulent. In other words, it charges a suppression of a belief that the collector would adopt a method of assess-

ing duties on domestic values not authorized by law.

Even if it were properly charged that defendant believed the collector would adopt such an unlawful method of ascertaining the duty, it does not charge that such a finding, if made, would be the true market value. The collector's finding is not made conclusive, and it is not affirmatively charged that defendant believed the goods were actually invoiced at less than their foreign market values. At best it charges or attempts to charge the suppression of an uncertain future event, which might never happen, as a fraudulent concealment.

> "The pretense must be a representation as to an existing fact or past event, and not a representation as to something to take place in the future."
>
> 19 Cyc. p. 394, citing cases, from many States and English authorities.

We think the court below was amply justified in treating the averments in this part of the count as mere surplusage, and that a review of this treatment of it, is not within the purview of this writ of error.

U. S. *v.* Keitel, 211 U. S. 370-397.

U. S. *v.* Kissel, 218 U. S. 601-606.

If, however, it is to be considered, we urge that the averments do not charge anything suppressed which was material to the declaration and within the purview of the things required to be disclosed.

THE CONFLICT ON THE CONSTRUCTION OF THE STATUTE BETWEEN THE VIEWS OF JUDGES HOUGH AND HAND.

Although it is not properly in the record, counsel for plaintiff in error has seen fit to attach as an appendix to their brief, two memoranda opinions of Judge Hand rendered on the first five counts of the indictment on a motion to quash made subsequent to the judgment entered by Judge Hough appealed from, and which is disassociated with any statement of the pleadings on which the memoranda were filed. To have a correct understanding of the purport of Judge Hand's memoranda, it would be necessary to have the record on the motion to quash on which they were made.

We will state that the defendant made a motion for a bill of particulars which was granted and under the order the District Attorney furnished a copy of the alleged other invoice referred to in the several counts, accompanying them with a statement that they gave only the prices at which the goods had been or were to be sold in the United States after importation.

The defendant then made a motion to quash on the indictment and bill of particulars on the hearing of which Judge Hand filed the memoranda referred to. Without that record it is impossible to properly interpret Judge Hand's rulings. Sufficient appears, however, to show that there is a direct conflict between the views expressed by Judge Hough on demurrer and Judge Hand's ruling on the motion to quash in respect to the fundamental question involved in both proceedings, namely, whether the defendant was guilty of an offense in failing to disclose the existence of matters *de hors* those within the scope and purview of the written declaration, invoice and entry, which constituted

the representations upon which the entry was sought to be made and were prescribed by the statutory forms already discussed.

IV.

The order appealed from should in all respects be affirmed.

Respectfully submitted,

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